Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79–745

RAYMOND M. CHENOWETH, dba NELLIS CAB CO., and as Representative of All Other Cab Companies Operating In The State Of Nevada,

*Petitioner,*

v.

THE STATE OF NEVADA: PUBLIC SERVICE COMMISSION, STATE OF NEVADA, NOEL CLARK, Chairman; EVO GRANATA, and HEBER HARDY, Commissioners individually and acting in their official capacities; STATE TAXICAB AUTHORITY OF NEVADA, a.k.a. STATE TAXICAB AUTHORITY OF CLARK COUNTY, and its Administrator and Board Members, individually and acting in their official capacity, MANUEL CORTEZ, JAMES JONES, B. J. HANDLON, and JOSEPH LA VOIE; CHECKER CAB CO., INC.; YELLOW CAB CO., WHITTLESEA CAB CO., ACE CAB CO., UNION CAB CO., WESTERN CAB CO., STAR CAB CO., A.N.L.V. CAB CO., VEGAS–WESTERN CAB CO., DESERT CAB CO., and HENDERSON CAB CO., Taxicab Companies operating in Clark County, Nevada; and SILVER STATE LIMOUSINE CO., WHITTLESEA V.I.P. CO., S. and F. LIMOUSINE CO., TANNER MOTOR TOURS OF NEVADA, LTD., dba GRAYLINE SIGHTSEEING TOURS OF NEVADA, Limousine Services in Clark County, Nevada, and Does One–One Hundred,

*Respondents.*

## ON PETITION FOR WRIT OF CERTIORARI

## RESPONDENTS' BRIEF IN OPPOSITION

Richard H. Bryan
Attorney General of Nevada

Mary C. Hyer
Deputy Attorney General

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RAYMOND M. CHENOWETH, dba NELLIS CAB CO., and as Representative of All Other Cab Companies Operating In The State Of Nevada,

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v.

THE STATE OF NEVADA: PUBLIC SERVICE COMMISSION, STATE OF NEVADA, NOEL CLARK, Chairman; EVO GRANATA, and HEBER HARDY, Commissioners individually and acting in their official capacities; STATE TAXICAB AUTHORITY OF NEVADA, a.k.a. STATE TAXICAB AUTHORITY OF CLARK COUNTY, and its Administrator and Board Members, individually and acting in their official capacity, MANUEL CORTEZ, JAMES JONES, B.J. HANDLON, and JOSEPH LA VOIE; CHECKER CAB CO., INC.; YELLOW CAB CO., WHITTLESEA CAB CO., ACE CAB CO., UNION CAB CO., WESTERN CAB CO., STAR CAB CO., A.N.L.V. CAB CO., VEGAS-WESTERN CAB CO., DESERT CAB CO., and HENDERSON CAB CO., Taxicab Companies operating in Clark County, Nevada; and SILVER STATE LIMOUDINR CO., WHITTLESEA V.I.P. CO., S. and F. LIMOUSINE CO., TANNER MOTOR TOURS OF NEVADA, LTD., dba GRAYLINE SIGHTSEEING TOURS OF NEVADA, Limousine Services in Clark County, Nevada, and Does One-One Hundred,

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# RESPONDENTS' BRIEF IN OPPOSITION

Richard H. Bryan
Attorney General of Nevada

Mary C. Hyer
Deputy Attorney General

Hampton M. Young, Jr.
Deputy Attorney General

## STATEMENT OF THE CASE

The original complaint in this action was filed on September 9, 1974, by Plaintiff RAYMOND M. CHENOWETH (Petitioner herein). The complaint sought a declaratory judgment and injunctive relief, alleging that Plaintiff had been denied due process and equal protection under the Fourteenth Amendment to the United States Constitution. Listed as defendants were the PUBLIC SERVICE COMMISSION OF NEVADA and its members in their official capacity, and the NEVADA STATE TAXICAB AUTHORITY and its members in their official capacity.

On March 23, 1976, a first-amended complaint was filed by RAYMOND M. CHENOWETH, d/b/a NELLIS CAB COMPANY, and representative of all other cab companies operating in the state of Nevada. Defendants were the PUBLIC SERVICE COMMISSION OF NEVADA, the NEVADA STATE TAXICAB AUTHORITY, the eleven other taxicab companies operating in Clark County, Nevada, and the five limousine companies in Southern Nevada. The amendments provided for a class action suit and added allegations of conspiracy, restraint of trade, violations of civil rights, and violations of the Nevada State Constitution to those already alleged in the original complaint.

Defendants responded to the amended complaint with Motions to Dismiss, and in one instance, a Motion for Judgment on the Pleadings. The motions were based on the applicability of the legal doctrines of res judicata, collateral estoppel, and the statute of limitations. The cases relied upon were Mirin v. Taxicab Authority of Clark County, Nevada, 441 F. 2d 1123 (9th



Cir.1971), cert. denied 404 U.S. 914 (1971), (hereinafter: Mirin I), Chenoweth v. Public Service Commission, Case No. A-68495, Eighth Judicial District Court of the State of Nevada, and Mirin v. The State of Nevada, 547 F.2d 91 (9th Cir. 1976), cert. denied 432 U.S. 906 (1976), (hereinafter: Mirin II).

Plaintiffs responded to all of the aforementioned motions. Then on November 29, 1976, Plaintiffs moved to consolidate the instant lawsuit with two other cases which Plaintiffs had filed in the Federal District Court for the District of Nevada: Chenoweth, et al. v. Checker, Civil No. R-2803 BRT, and Chenoweth, et al. v. Hilbrecht, Civil No. R-76-23 BRT. The Checker complaint alleged violations of the Clayton Act, the Sherman Act, the Anti-Trust Common Law and the Civil Rights Statutes. Although the Hilbrecht complaint alleged violations of the Civil Rights Statutes and the Sherman Act, its primary thrust was a claim of legal malpractice brought into federal court under the cloak of pendent jurisdiction.

On January 25, 1977, the District Court denied the motion to consolidate on the grounds that consolidation would result in delay to the prejudice of the defendants in the Hilbrecht case. (See exhibit 1 attached hereto).

However, on June 3, 1977, the Court ordered a status conference on the three cases: Chenoweth v. State of Nevada, Civil No. R-74-132 BRT (the instant action), Chenoweth v. Checker, Civil No. R-2803 BRT, and Chenoweth v. Hilbrecht, Civil No. R-76-23 BRT. The Court specifically stated in

its notice of the conference that it was not to be implied that any motion to consolidate had been granted. Plaintiffs promptly renewed their motion to consolidate. At the time of the status conference, the Court once again denied the consolidation attempt.

Never deterred, Plaintiffs then attempted to file identical amended complaints in Chenoweth v. Checker and Chenoweth v. State of Nevada.

On January 12, 1978, the Court entered its order. The Court stated, "None of the alleged claims for relief in the tendered Second Amended Complaint states a claim within the jurisdiction of this Court. All of the claims for relief in the First Amended Complaint and in the tendered Second Amended Complaint are barred by the doctrine of res judicata." (See Petitioner's exhibit A).

Promptly thereafter, Plaintiffs filed a Motion to Disqualify presiding Judge Bruce R. Thompson on the grounds that the judge's son was an attorney with the defense law firm in Chenoweth et al. v. Hilbrecht, Civil No. K-76-23 BRT, one of the cases unsuccessfully sought to be consolidated. Further, Plaintiffs alleged that the judge should disqualify himself because of an unfavorable statement made concerning one of Plaintiff's attorneys, MR. KERMIT WATERS, in a totally unrelated case.

The judge denied the Motion for Disqualification on the basis that his son's law firm represented no one in the instant action. Further, the bias must focus on the party rather than the attorney and



focus on the extra-judicial conduct as opposed to judicial conduct. (See Petitioner's exhibit B).

Plaintiffs immediately appealed to the Ninth Circuit Court of Appeals. Defendants filed a Motion to Dismiss the appeal as frivolous and upon due consideration of appellees' motions, the Ninth Circuit affirmed the district court's order of dismissal based upon this honorable Court's decision in State of Montana v. United States, 47 L.W. 4190 (February 22, 1979). Petitioners filed a petition for rehearing which the court denied on August 13, 1979. (See Petitioner's exhibit D).

It should also be noted that the district court dismissed Chenoweth v. Hilbrecht, Civil No. R-76-23, BRT, on December 27, 1977. (See exhibit 2 attached hereto). The Plaintiffs appealed and the Ninth Circuit Court of Appeals dismissed pursuant to Rule 12(c), Federal Rules of Appellate Procedure. (See exhibit 3 attached hereto).

Summary judgment in favor of defendants-respondents was granted in Chenoweth v. Checker, Civil No. R-2803 BRT. (See exhibit 4 attached hereto). Plaintiffs appealed and the Ninth Circuit Court of Appeals affirmed based on this Court's decision in Montana v. United States, No. 77-1134, 47 L.W. 4190. (See exhibit 5 attached hereto). The Petition for Rehearing was denied on June 8, 1979, and appellants (petitioners in case at bar) failed to seek review timely. (See exhibit 6 attached hereto).

## ARGUMENT

1. IT WAS PROPER FOR THE LOWER COURT

TO DENY LEAVE TO AMEND AND DISMISS THE ENTIRE ACTION BASED ON PETITIONER'S FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED AND ON THE DOCTRINE OF RES JUDICATA

A review on writ of certiorari is not a matter of right and will be granted only where there are special and important reasons therefor. Sup.Ct. R.19.

In the instant petition, the Petitioner has failed to provide sufficient reasons to justify an extraordinary writ. Rather, Petitioner has confused the facts, issues and cases. Indeed, Petitioner even fails to properly caption the instant appeal. He uses the caption from a separate case, Chenoweth v. Checker, Civil No. R-2803 BRT, instead of the caption of the complaint on file in Chenoweth v. State of Nevada, the instant case.

In addition to the wrong caption, wrong parties are included as plaintiff-appellants. Neither BALABAN nor ELIADES was ever a party-plaintiff in the instant case. Both men are actually named defendants in the first amended complaint. (See exhibit 7 attached hereto). Balaban and Eliades pursued their antitrust and civil rights claims as plaintiffs in the case Chenoweth v. Checker, R-2803 BRT. Summary Judgment was entered against plaintiffs and this decision was affirmed by the Ninth Circuit Court of Appeals, No. 78-2449. The time to petition for a writ of certiorari in that case has since lapsed without action by the plaintiffs. The alleged "petitioner" status herein appears to derive from the caption of a document entitled Second Amended Complaint, which was proposed almost three years after the action began.



However, leave to file was denied by the district court on the grounds that none of the alleged claims for relief stated a claim within the jurisdiction of the court. All claims were barred by the doctrine of res judicata. (See Petitioner's exhibit A).

Petitioners seek review of the trial court's decision denying leave to amend and dismissing the entire action. Rule 15 of the Federal Rules of Civil Procedure was the governing provision. After a responsive pleading has been served, "a party may amend his pleading only by leave of court or by written consent of the adverse party . . ." The general standard was stated in Foman v. Davis, 371 U.S. 178, at 182 (1962):

> "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be freely given."

However, if the proposed amendment is futile and would fail to state a cause of action, leave to amend need not be granted. McNaughton v. New York Railroad Co., 220 F. 2d 835, 840 (7th Cir. 1940).

In the instant case, the alleged claims for relief in both the first amended com-

plaint and the proposed second amended complaint failed to state a claim within the jurisdiction of the court.

Petitioner Chenoweth had previously raised the same substantive issues in Mirin I. The Ninth Circuit Court of Appeals held: "The dismissal of the action was proper but it should have been dismissed because the petition failed to state a claim upon which relief could be granted. (Citations omitted)." 441 F.2d 112. This Court denied the petition for writ of certiorari in that case. See 404 U.S. 914 (1971).

Petitioner attempts to obfuscate the fact that the doctrine of res judicata bars his claims for relief. He argues that res judicata should not operate because the cases used as a basis for the application of the doctrine were deliberately lost by the petitioner's then attorney. He cites for this proposition United States v. Throckmorton, 98 U.S. 61 (1878).

This argument is not persuasive. The Throckmorton test for relief from judgment requires both proof of fraudulent representation and a showing by petitioner that he ". . .has been prevented from presenting all of his case to the court." 98 U.S. at 66.

Petitioner has offered no credible proof of the alleged sell-out by former counsel. Neither has he established any nexus between former counsel's actions and petitioner's claims in the District Court action.

Petitioner has clearly failed to provide the level of proof necessary to satisfy the conditions of relief discussed in the



very case upon which he relies.

Furthermore, this issue, too, was raised previously in Mirin II:

> ". . . the Appellants tendered two affidavits which they claim showed that their attorney of record in the District Court phase of Mirin-1 took bribes from non-parties to perform sham representation of Mirin and Chenoweth. Accordingly they assert Mirin-1 was not an adversary proceeding worthy of the application of the Doctrine of Res Judicata. We deem the assertion to be without merit. The denial of reconsideration was within the discretion of the District Court and we find no abuse of that discretion. Appellants failed to show any prejudice to their meritless causes through their counsel's representation." (at 94).

Certiorari was also denied in that case. See 432 U.S. 906 (1976).

Finally, Petitioner argues that res judicata should not operate until there has been a trial on the merits. This is a frivolous statement of the law. To the contrary, it is well-settled that a judgment dismissing a complaint for failure to state a claim upon which relief can be granted is an adjudication on the merits. In a subsequent suit on the same claim, the judgment has the same res judicata effect as though it were rendered after trial. Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978); Shaw v. Merritt-Chapman & Scott Corp., 554 F.2d 786 (6th Cir. 1977); Durham v. Mason & Dixon Lines, Inc., 404 F.2d 864 (6th Cir. 1968), cert. denied, 394 U.S. 998 (1968); Bartsch v. Chamberlain Co. of America, Inc., 266 F.2d 357 (6th Cir.

1959).

2. THE COURT DID NOT ERR IN DENYING THE MOTION TO DISQUALIFY THE PRESIDING JUDGE.

After the federal district court had dismissed the instant action, Petitioners sought to disqualify the presiding judge on the grounds that his son, HAROLD B. THOMPSON, was a member of a law firm which had an interest in the outcome of this litigation. However, this was not factually true. JUDGE THOMPSON's son was an attorney with a law firm representing a litigant in Chenoweth, et al v. Hilbrecht. et al., Case No. R-76-23 BRT, a malpractice action brought by appellant RAYMOND CHENOWETH against an attorney who had represented him in two previous matters before the District Court. HAROLD B. THOMPSON has never acted as a lawyer in these proceedings and did not have an interest which could be substantially affected by the outcome of these proceedings.

CHENOWETH has cited the case of S.C.A. Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir. 1977) in support of the proposition that the court erred. However, this case is not in point since a relative of the judge had appeared as an attorney for one of the parties in the proceedings and this relative had a substantial financial interest in the proceedings.

In United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456 (5th Cir. 1977), the district judge's son was a member of the law firm which represented Equifax. However, the circuit court held that this alone did not require the judge to have disqualified himself. The Court at page 463 stated:



". . . That the son's law firm participated in the proceeding does not mean that he was 'acting as a lawyer in the proceeding.' See S.C.A. Services, Inc. v. Morgan, 557 F.2d 110 (7th Cir., 1977). That provision requires actual participation. The fears of judicial bias that might result from an offspring's act of participation in a proceeding do not merit automatic disqualification of the law firm to which the relative belongs. The 'financial interest' provision might apply if the district judge's son were a partner in the firm but his status as an associate removes that fear. See Id. His salary interest as an associate is too remote to fall under this 'financial interest' provision."

It should be noted that, as set forth in the order denying disqualification, HAROLD B. THOMPSON did not become a member of the law firm of WAIT, SHAMBERGER, GEORGESON, McQUAID & THOMPSON until January 1, 1978. Prior to that time he had been an employee of the law firm for approximately two (2) years. (See Petitioner's exhibit B).

The basic rules of law governing the recusal of a trial judge are well settled. The sufficiency of the affidavit setting forth grounds for disqualification may properly be reviewed by the challenged judge. Fong v. American Airlines, Inc., 431 F.Supp. 1334 (N.D. Cal. 1977). Furthermore, the trial judge need only recuse himself "if he determines that the facts alleged in the affidavit, taken as true, are such that they would convince a reasonable man that he harbored a personal, as opposed to a judicial,

bias against the movant." U.S. v. Dansker, 537 F.2d 40, 53 (3rd Cir. 1976); U.S. v. Thompson, 483 F.2d 527 (3rd Cir. 1973). If the affidavit submitted is legally insufficient to compel the presiding judge's disqualification, he has a duty to preside. Simmons v. U.S., 302 F.2d 71 (3rd Cir. 1962).

Petitioners failed to provide any legally sufficient reason for the disqualification of the presiding trial judge. Therefore, the judge was constrained to deny the motion.

## CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Ninth Circuit which affirms the United States District Court for the District of Nevada in granting a dismissal against Petitioners herein and in Respondents' favor should be affirmed.

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Attorney General of Nevada

MARY C. HYER
Deputy Attorney General

HAMPTON M. YOUNG, JR.
Deputy Attorney General

## EXHIBITS

EXHIBIT 1

In the United States District Court
for the District of Nevada

[Filed January 25, 1977]

| | |
|---|---|
| Ray Chenoweth, dba Nellis Cab Company, William Mirin, dba Strip Cab Company,<br>Plaintiffs,<br><br>vs.<br><br>Norman Hilbrecht, Doe Jones and Doe Schreck,<br><br>Defendants. | Civil No. R-76-23-BRT |

ORDER DENYING MOTION
FOR CONSOLIDATION

On October 29, 1976 the court granted defendants' motion for summary judgment dismissing Count One and Count Two (claims asserted under federal antitrust laws) in Chenoweth, et al, v. Checker, Inc., et al, Civil #R-28-03-BRT. At the time of the order of dismissal the court entered a stay order pending determination of the case on appeal. Plaintiffs have noticed an appeal and obtained an extension of time to docket the record on appeal to February 7, 1977.

On November 29, 1976 plaintiffs moved to consolidate the following actions:

Chenoweth v. State of Nevada, et al,

Civil #R-74-132 BRT

Chenoweth, et al, v. Checker, Inc., et al, Civil #R-28-03 BRT

Chenoweth, et al, v. Hilbrecht, et al, Civil #R-76-23 BRT

Under these circumstances consolidation would result in delay to the prejudice of the defendants in the Hilbrecht case. Accordingly,

IT IS ORDERED,

That the motion to consolidate, be, and the same hereby is, denied.

DATED

/s/ BRUCE R. THOMPSON
United States District Judge

EXHIBIT 2

In the United States District Court
for the District of Nevada

[Filed December 29, 1977]

| | |
|---|---|
| Ray Chenoweth, dba Nellis Cab Company, William Mirin, dba Strip Cab Company,<br><br>Plaintiffs,<br><br>vs.<br><br>Norman Hilbrecht, et al.,<br><br>Defendants. | Civil No. R-76-23-BRT |

ORDER DISMISSING ACTION

On July 15, 1977, defendants served and filed a motion to dismiss. At a status conference on that date the Court granted plaintiffs thirty days to answer the motion. On August 15, 1977, plaintiffs tendered a first amended complaint and filed a motion for permission to file it. On September 6, 1977, defendants filed an amended motion to dismiss directed at the first amended complaint. On September 27, 1977, the Court entered an order granting plaintiffs until October 21st, 1977 to respond to the motion to dismiss. To this date no response has been filed. Under Local Rule 16(e), this default constitutes a consent that the motion to dismiss be granted.

It is also evident that on the merits the motion to dismiss is well taken. Neither the original complaint nor the tendered first amended complaint states a claim for relief within the jurisdiction of this Court. In substance, this is nothing more nor less than a malpractice action against defendant attorneys. It doesn't improve the situation to allege a conspiracy. 42 U.S.C. 1985(3), requires a discriminatory animus which is racial or class-based. Griffin v. Breckenridge, 403 U.S. 88 (1971). None such has been or can be alleged. 42 U.S.C. 1983 requires action under color of state law. Count II of the tendered first amended complaint blandly alleges "acting under the color of state law", but it takes more than a parroting of the statutory language to invoke the jurisdiction of the federal court. An attorney who negligently or wilfully fails properly to represent a client is patently not acting under color of state law within the meaning of the Civil Rights Acts.

Good cause appearing,

IT HEREBY IS ORDERED:

1. Leave to file the first amended complaint is hereby denied.

2. The motion to dismiss is hereby granted.

DATED: December 27, 1977.

/s/ BRUCE R. THOMPSON
United States District Judge

EXHIBIT 3

United States Court of Appeals
for the Ninth Circuit

[Filed August 22, 1978]

| | |
|---|---|
| Ray Chenoweth, dba Nellis Cab Co., William Mirin, dba Strip Cab Co., Plaintiffs-Appellants, | |
| vs. | No. 78-2524 D.C. #CV R-76-23-BRT Nevada (Las Vegas) |
| Norman Hilbrecht, Doe Jones and Doe Schreck, Defendants-Appellees. | ORDER |

Before: HUFSTEDLER and WRIGHT, Circuit Judges.

Upon due consideration of appellees' motion, this appeal is dismissed. Rule 12(c), Federal Rules of Appellate Procedure.

EXHIBIT 4

In the United States District Court
for the District of Nevada

[Filed December 27, 1977]

| | | |
|---|---|---|
| Ray Chenoweth, et al., Plaintiffs, vs. Checker, Inc., et al., Defendants. | ) | Civil No. R-2803 BRT |

ORDER GRANTING SUMMARY JUDGMENT

Defendants have severally filed motions for summary judgment with respect to the remainder of this action after dismissal of the appeals from this Court's earlier rulings dismissing the antitrust claims for relief.

Plaintiffs filed a motion for leave to file a second amended complaint and for stay of one defendant's motion for summary judgment. Then on September 27, 1977 a stipulation and order were filed granting plaintiffs an extension of time until October 19, 1977 "to respond to the various motions for summary judgment." No such responses have been received. Under the provisions of Local Rule 16(e) this default constitutes a consent to the granting of the motions.

Defense counsel have done an excellent job of preparing and documenting their motions for summary judgment. Their propos findings of undisputed material facts and conclusions of law present a clear picture of the history of this litigation. They ar adopted by the Court.

FINDINGS OF FACT

1. The original complaint, brought by plaintiffs Chenoweth, Mirin, Las Vegas Star Taxi, Inc. (hereafter "Las Vegas Star") and Balaban, sought relief under the federal antitrust laws (Counts I and II) and the Civil Rights Laws (Counts III, IV and V). On October 29, 1976, this Court dismissed Counts I and II for lack of subject matter jurisdiction. Thus, what remains of the complaint are the civil rights counts, brought on behalf of an alleged class of taxicab operators in Southern Nevada.

2. On January 30, 1969, plaintiffs Chenoweth and Mirin, along with Fred D. Hasty and Joseph H. Abrahams, instituted suit in this Court against the Public Service Commission of the State of Nevada (hereafter "the Commission") and the member of the Commission in Mirin, et al. v. Taxi Cab Authority of Clark County, et al., LV-1256 (hereafter "Mirin I"). The complaint in Mirin I sought to enjoin enforcement of the December 14, 1966 Allocation Order of the Commission, which regulated the number of taxicabs that could be operated in Clark County, Nevada, on the ground that said order violated plaintiffs' constitutional rights to due process and equal protection of law. On June 25, 1969, Judge Foley granted defendants' motion to dismiss the complaint with prejudice and, on April 29,



1971, the Court of Appeals affirmed that dismissal on the ground that the complaint failed to state a claim upon which relief could be granted. Mirin v. Taxi Cab Authority of Clark County, Nevada, 441 F.2d 1123 9th Cir. 1971).

3. On August 7, 1969, plaintiffs Chenoweth and Mirin filed a suit in State Court against the Commission, this time adding the Clark County Taxicab Authority (hereafter "Taxicab Authority") as a defendant. Chenoweth, et al. v. Public Service Commission, et al., Case No. A 68495, Eighth Judicial District Court of the State of Nevada (hereafter "State Mirin"). This new case again alleged that the December 14, 1966 Allocation Order violated plaintiffs' constitutional rights of due process and equal protection, and that a new Allocation Order passed by the Commission on July 18, 1969, likewise violated plaintiffs' rights. On September 5, 1969, the State Court ruled in favor of defendants on the ground, inter alia, that the said Allocation Orders were "not unreasonable, arbitrary or unlawful, and the utilization of such formula did not deny the plaintiffs any legal rights." On September 28, 1970, the Supreme Court of Nevada ordered dismissal of the appeal in State Mirin.

4. On December 10, 1971, plaintiffs Chenoweth and Mirin, this time joined by plaintiff Las Vegas Star, launched a third constitutional attack upon the December 14, 1966 Allocation Order and the July 18, 1969 Allocation Order, by the filing in this Court of Mirin, et al. v. The State of Nevada, et al., Civ. No. LV-1638 (hereafter "Mirin II"). Jurisdiction in this action was based, inter alia, upon 42 U.S.C. § 1983. On

December 27, 1974, Judge Foley entered judgment against plaintiffs Chenoweth and Mirin on grounds of res judicata. On October 22, 1976, the Ninth Circuit Court of Appeals affirmed Judge Foley, ruling that the "valid and final judgment in [Mirin I] operates as an absolute bar" to Mirin II:

> "It is clear the parties involved in these proceedings and those in Mirin-I are identical or their privies. Further, Appellants' attack upon the commission's reinstatement of its allocation order of December 14, 1966 in Mirin-I and their attack upon the same order in these proceedings are each based upon the same federal questions and claims which were, or could have been raised in Mirin-I. 547 F.2d 91, 94."

5. Fred D. Hasty and Joseph Abrahams were the owners of Star Cab Co., a partnership, at the time the complaint in Mirin I was filed. The present corporate plaintiff, Las Vegas Star Taxi, Inc., became the successor in interest to the partnership as the result of an agreement among the partners to transfer all the assets and liabilities of the partnership to the corporation.

6. The Taxicab Authority is the lawful successor to the Commission, 547 F.2d 91, 93, n.1.

CONCLUSIONS OF LAW

1. There is an identity of parties between certain plaintiffs in the present lawsuit and the unsuccessful plaintiffs in Mirin I, State Mirin and Mirin II. Chenoweth and Mirin were actual parties to each of these prior lawsuits, and Las Vegas Star



Taxi, Inc. is in traditional privity with Hasty and Abrahams, who were unsuccessful plaintiffs in Mirin I. As successor in interest to the partnership, the corporation is bound by the final decision in Mirin I rendered against Hasty and Abrahams. 1B Moore's Federal Practice, § 0.411[1] at 1257; Baltz v. Batto, 147 F.Supp. 468 (W.D. Tex. 1956). See Industrial Credit Co. v. Berg, 388 F.2d 835 (8th Cir. 1968). Additionally, the Taxicab Authority is in traditional privity with the Commission. Id.

2. The present case arose from the same operative facts that were involved in the prior Mirin litigation; namely, the February 28, 1966 contract among certain defendants which limited the number of taxicabs which could be operated in Clark County, Nevada, and the passage of the December 14, 1966 and July 18, 1969 Allocation Orders. Flynn v. State Board of Chiropractic Examiners, 418 F.2d 688 (9th Cir. 1969). Even plaintiffs' legal theory in this case, that the passage of these Allocation Orders violated plaintiffs' constitutional rights of due process and equal protection, is identical to that asserted in the prior Mirin litigation. Mirin v. State of Nevada, 547 F.2d 91, 94 (1976). The present case is, therefore, based upon the same cause of action asserted in Mirin I, State Mirin, and Mirin II. Small Business Administration v. Taubman, 459 F.2d 991, 992 (9th Cir. 1972); See Mirin v. State of Nevada, supra, 547 F. 2d at 94; Scoggin v. Schrunk, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Johnson v. Department of Water and Power, 450 F.2d 294, 295 (9th Cir. 1971).

3. There was a final determination

"on the merits" in Mirin I, State Mirin and Mirin II. 1 Moore's Federal Practice, § 0.409[1] at 1005.

4. Since there is an identity of parties (or their privies), the prior actions are based upon the same cause of action as the present case, and there was a final judicial determination on the merits in each of the prior actions, plaintiffs Chenoweth, Mirin and Las Vegas Star barred from relitigating this same cause of action against defendant Taxicab Authority by the doctrine of res judicata. Mirin v. State of Nevada, supra, 547 F.2d at 94.

5. The present complaint seeks relitigation of matters which have been litigated and determined in prior Mirin proceedings. The unsuccessful plaintiffs in the prior Mirin litigation are precluded from relitigating these matters by the doctrine of collateral estoppel by judgment. Brown v. Delayo, 498 F.2d 1173, 1175 (10th Cir. 1974); Parker v. McKeithen, 488 F.2d 553, 557-559 (5th Cir. 1974). See Chism v. Price, 457 F.2d 1037, 1039-1040 (9th Cir. 1972). This defense is available to the said defendants and to each of the other defendants who were not parties to the prior litigation, under the doctrine of non-mutuality of estoppel. Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 328-329 (1971). Accordingly, all defendants are entitled to dismissal of the claims of plaintiffs Chenoweth, Mirin and Las Vegas Star. Id.

6. Plaintiff taxicab operators do not constitute a recial class, nor do they allege discrimination "akin to racial bias." Griffin v. Breckenridge, 403 U.S. 88 (1971).



Defendants are, therefore, entitled to judgment against all plaintiffs as to Count IV because plaintiffs are not members of a racial class or any other protected class under 42 U.S.C. § 1985 (3). Arnold v. Tiffany, 359 F.Supp. 1034, 1036 (C.D.Cal. 1973), aff'd, 487 F.2d 216 (9th Cir.), cert. denied, 415 U.S. 984 (1974); Western Telecasters, Inc. v. California Federation of Labor, AFL-CIO, 415 F.Supp. 30-33 (S.D.Cal. 1976).

7. Defendants are also entitled to judgment on Count IV because plaintiffs have not alleged animus motivated by their class status, but rather animus generated by plaintiffs' actions. Lopez v. Arrowhead Ranches, 523 F.2d 924 (9th Cir. 1975); Arnold v. Tiffany, supra, 487 F.2d at 218.

8. A corporation is not a "person" entitled to relief under 42 U.S.C. §§ 1983 and 1985 (3). Erlich v. Glasner, 418 F.2d 226 (9th Cir. 1969). Accordingly, defendants are entitled to dismissal of the claims brought by Las Vegas Star Taxi, Inc.

9. The Court has found that the Taxicab Authority is entitled to judgment against Chenoweth, Mirin and Las Vegas Star on the grounds of res judicata. These plaintiffs, therefore, cannot state a claim under 42 U.S.C. § 1983 because the actions of the individual plaintiffs were not taken "under color of state law." Phillips v. Ironworkers, __F.2d___, 195 LRRM 2875 (9th Cir., June 13, 1977); Sykes v. State of California, 497 F.2d 197, 202 (9th Cir. 1974). Accordingly, Count III of the complaint must be dismissed as to Mirin, Chenoweth and Las Vegas Star.

10. The only remaining cause of action is a claim by plaintiff Balaban under 42 U.S.C. § 1983. Balaban cannot succeed under § 1983 upon the same allegations which have been held insufficient when asserted by his co-plaintiffs in Mirin I, State Mirin, and Mirin II. Williams v. Dunbar, 377 F.2d 505, 506 (9th Cir. 1967). Accordingly, defendants are entitled to dismissal of this remaining count brought by Balaban.

11. Count V, brought by plaintiff Chenoweth pursuant to the Declaratory Judgment Act (28 U.S.C. § 2201), does not confer an independent jurisdictional basis for suit in this Court. Smith v. Grimm, 534 F.2d 1347, 1349 (9th Cir. 1976). Accordingly, defendants are entitled to dismissal of Count V.

12. The motion for leave to file a second amended complaint is denied.

DATED: December 23, 1977.

/s/ BRUCE R. THOMPSON
United States District Judge

EXHIBIT 5

United States Court of Appeals
for the Ninth Circuit

[Filed April 6, 1979]

| | | |
|---|---|---|
| Ray Chenoweth, et al., Plaintiffs-Appellants, vs. Checker, Inc., et al., Defendants-Appellees. | ) | No. 78-2449<br>D.C. #R-2803-BRT Nevada (Reno)<br>ORDER |

Before: GOODWIN and ANDERSON, Circuit Judges.

Upon due consideration of appellees' motions, the opposition thereto, and the record on appeal, the Court orders the following:

(a) the district court's order of summary judgment is affirmed, see Montana v. United States, No. 77-1134, 47 L.W. 4190 (February 22, 1979); and

(b) the motions to extend briefing time are denied as moot.

EXHIBIT 6

United States Court of Appeals
for the Ninth Circuit

[Filed June 20, 1979]

| | |
|---|---|
| Ray Chenoweth, et al., Plaintiffs-Appellants, | |
| vs. | No. 78-2449 |
| Checker, Inc., et al., Defendants-Appellees. | D.C. #R-2803-BRT<br>Nevada (Reno)<br>ORDER |

Before: GOODWIN and ANDERSON, Circuit Judges.

The petition for rehearing is denied.

EXHIBIT 7

In the United States District Court
for the District of Nevada

[Filed March 23, 1976]

| | |
|---|---|
| Raymond M. Chenoweth, d/b/a Nellis Cab Co., and as Representative Of All Other Cab Companies Operating In The State Of Nevada, Plaintiff, vs. The State of Nevada; Public Service Commission, State of Nevada, Noel Clark, Chairman; Evo Granata, and Heber Hardy, Commissioners individually and acting in their official capacities; State Taxicab Authority of Nevada, a.k.a. State Taxicab Authority of Clark County, and its Administrator and Board Members, individually and acting in their official capacity, Manuel Cortez, James Jones, B.J. Handlon, and Joseph La Voie; Checker Cab Co., Inc; Yellow Cab Co., Whittlesea Cab Co., Ace Cab Co., Union Cab Co., Western Cab Co., Star Cab Co., A.N. L.V. Cab Co., Vegas-Western | Civil No. R74-132 BRT<br>FIRST AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND MANDATORY INJUNCTIVE RELIEF, FOR ATTORNEY's FEES AND COSTS, AND AFTER COURT DETERMINATION FOR CLASS ACTION DAMAGES AND ORDER; AND FOR JURY TRIAL |

Cab Co., Desert Cab Co., and Henderson Cab Co., Taxicab Companies operating in Clark County, Nevada; and Silver State Limousine Co., Whittlesea V.I.P. Co., S. and F. Limousine Co., Tanner Motor Tours of Nevada, Ltd., d.b.a. Greyline Sightseeing Tours of Nevada, Limousine Services in Clark County, Nevada, and Does One--One Hundred,

Defendants.

JURISDICTION

Jurisdiction of the Court is found in the following:

SPO, Carson City, Nevada, 1980